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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID R. BEACH and LINDA M. BEACH,
Petitioners,
v.
OCWEN FEDERAL BANK,
Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF FEDERAL HOME LOAN MORTGAGE CORPORATION, FEDERAL NATIONAL MORTGAGE ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICA'S COMMUNITY BANKERS, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, AND MORTGAGE BANKERS ASSOCIATION OF AMERICA IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The issue before this Court has profound implications for the mortgage lending industry and for individual consumer borrowers nationwide. Undersigned *amici curiae*

[1] Consents for the filing of this brief are being filed contemporaneously herewith. Pursuant to Supreme Court Rule 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and state that no person, other than *amici*, their members and their counsel, made a monetary contribution to the preparation or submission of this brief.

respectfully submit this brief to explain why any reversal of the lower court's ruling may have widespread, negative effects on mortgage lending and finance, and on consumers as well.

Amici curiae are well situated to assist the Court. *Amici* Federal Home Loan Mortgage Corporation ("Freddie Mac") and Federal National Mortgage Association ("Fannie Mae") are corporations chartered by Congress, with the statutory mission of fostering and promoting a secondary market for the purchase and sale of mortgages on residential real estate. 12 U.S.C. §§ 1451 (Freddie Mac), 1716 (Fannie Mae). Both act in the secondary mortgage market to increase the liquidity of mortgage investments, and thereby make more capital available for home financing for consumers. *Amici* American Bankers Association, America's Community Bankers, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, and Mortgage Bankers Association of America are six leading mortgage industry trade associations.[2] Together, the association

[2] The associations are varied in their membership and focus. American Bankers Association is the largest national trade association of banks, having members in all fifty states and the District of Columbia that together hold approximately ninety percent of the domestic assets of the American banking industry. America's Community Bankers is the national trade association for 2,000 savings and community financial institutions and related businesses, which combined originated $125 billion in residential mortgages in 1995 alone. American Financial Services Association is an association of over 350 providers of financial services to consumers and small businesses, who are responsible for extending between 15 and 20 percent of all consumer credit in America today. Consumer Bankers Association is an association of members who, in combination, hold more than 900 bank and savings and loan charters, with total assets of more than $2.9 trillion. Consumer Mortgage Coalition is an association of leading nationwide mortgage lenders and servicers. And, Mortgage Bankers Association of America has 3,000 members active in the mortgage finance field, including commercial banks, mortgage banking firms, title companies and savings and loan associations.

amici represent the entities—commercial, savings and cooperative banks, savings and loan associations, mortgage companies, and other financial institutions—that are responsible for originating most home mortgage loans made in America today.[3]

STATEMENT OF THE CASE

As a supplement to Petitioners' Statement, *amici* believe it is important to add the following.

This case arises only because Petitioners David and Linda Beach breached their obligation to repay $97,300 that they had borrowed on August 15, 1986 from Respondent's predecessor, Great Western Bank ("Bank"). Joint Appendix 49, ¶ I.1, 50, ¶ II.1, 80 ("J.A."). The Beaches stopped paying on their 30-year loan on November 1, 1991. *Id.* 49-50, 90. The Bank then tried to foreclose on the Beaches' property, a right permitted in the loan contract, as its way of recovering the loan funds. *Id.* 27.

The Beaches did not deny their breach. J.A. 55, ¶ 8. Instead, they defended the suit on their 1991 default by raising the collateral issue of alleged violations of the Truth in Lending Act, 15 U.S.C. §§ 1601-1649 (1994 & Supp. 1995) ("TILA"), at the 1986 loan closing. The Beaches sought to rescind the loan, under 15 U.S.C. § 1635, as a matter of equitable recoupment. J.A. 51-52.

Rescission would have given the Beaches a windfall. David and Linda Beach admit they owed the Bank, and did not pay, over $115,000 in principal, interest and other sums. J.A. 55, ¶ 8. In defending the foreclosure by demanding rescission under TILA, the Beaches sought the statutory remedy contained in 15 U.S.C. § 1635. That remedy would have invalidated the mortgage, and re-

[3] Respondent Ocwen Federal Bank is a member only of *amicus curiae* Mortgage Bankers Association of America and not of any other *amici* filing this brief.

quired the Bank to pay back the approximately $50,000 in loan interest paid by the Beaches during the five years since the closing. J.A. 55, ¶ 7.[4] This huge refund was justified in equity, the Beaches argued, because of TILA errors by the Bank. But those errors that the Beaches allege would permit them to rescind their obligation were the lender's *overstatements* of the cost of credit, in several respects, on the TILA disclosure form. J.A. 62-65.[5] There is no suggestion in the record that they were misled or misunderstood their commitment, or that they were actually overcharged, or that they would not have taken the loan had the disclosures been accurate. Indeed, since the Bank had overstated the costs of the loan on its disclosure form, the Beaches actually obtained from the Bank a better deal than they had thought.

SUMMARY OF ARGUMENT

The Florida Supreme Court held that the statutory three-year deadline on the rescission right contained in TILA applies when the borrower attempts to rescind a loan, either as a defense to foreclosure or as an affirmative claim. *Beach v. Great Western Bank*, 692 So. 2d

[4] As set forth at pages 9-10 herein, a borrower who rescinds a loan is entitled to be repaid, among other moneys, all loan interest previously paid. The record is unclear about the precise amount of interest paid by the Beaches before they defaulted, giving only an amount of $52,376.71 for what the Beaches had made in "payments and late charges." J.A. 55, ¶ 7. From the record, it can be determined that $2,621.32 of those payments was principal repayment, which is not refunded to the Beaches even if rescission is permitted. *Compare* J.A. 49, ¶ 1 (original principal balance) *with* J.A. 50, ¶ 2 (principal balance owed). While some of the remaining $49,755.39 is undoubtedly late charges, not refundable in a rescission, one can assume those amounts may well have been offset by some of the closing costs from the origination of the loan, which the Beaches would have recovered in rescission.

[5] Although the trial court also found that the Bank had improperly classified a state transfer tax (J.A. 68-70), this ruling ultimately proved to be wrong as a matter of law. *Beach v. Great Western Bank*, 670 So. 2d 986, 993 n.4 (Fla. Dist. Ct. App. 1996), *aff'd*, 692 So. 2d 146 (Fla. 1997), *cert. granted sub nom. Beach v. Ocwen Federal Bank*, 118 S. Ct. 294 (U.S. Oct. 14, 1997) (97-5310).

146 (Fla. 1997), *applying* 15 U.S.C. § 1635(f), *cert. granted sub nom. Beach v. Ocwen Federal Bank*, 118 S. Ct. 294 (Oct. 14, 1997) (97-5310). This Court's review of the *Beach* ruling has nationwide implications for mortgage lending, because it could call into question the enforceability of mortgage loans older than three years that banks, mortgage companies and others involved in mortgage finance now believe are valid. The value of mortgage loans that could be affected is in the billions of dollars.

The statute does not authorize borrowers to exercise any right of rescission beyond an explicit three-year deadline. The operative section of TILA is clear that any rescission rights "shall expire" three years after closing of the loan. 15 U.S.C. § 1635(f). Borrowers, such as the Beaches, who break their promises to repay their mortgage loans are not granted any exemption from the statutory time bar. Indeed, recent TILA amendments incorporate the same time limit upon the exercise of any rescission rights in response to a lender's attempt to foreclose. While those same amendments saved the right to rescind "under State law" in a foreclosure situation, that savings clause did not create any special federal right under TILA to enable defaulting borrowers to cancel their loans without regard to the three-year deadline. 15 U.S.C. § 1635(i)(3).

This Court should not imply or create any right that enables borrowers to raise an expired rescission claim, as a defensive maneuver, years after obtaining the loan. Recognizing such an open-ended power would lead to inequitable results and would likely harm consumer borrowers generally, as well as lenders.

Rescission is, by statute, an equitable remedy, and recoupment principles upon which Petitioners rest are equitable in nature. Ironically, though, when an expired rescission right is permitted to be exercised many years after the closing, due to a TILA violation at closing, the

effects of that rescission are unfair. The statutory rescission remedy requires that the holder of the loan release the mortgage and repay to the borrower (or credit to his account) all of the finance or other charges, including interest, ever paid on the loan. As a result, the holder of a mortgage note rescinded many years after closing invariably would be required to refund tens of thousands of dollars to the borrower. The borrower—who breached the loan contract and would usually be in foreclosure or bankruptcy court—would end up with a loan that retroactively had been rendered interest-free and unsecured. This result is a windfall, because most TILA errors of the type that are uncovered only years after closing are technical, and did not cause any harm to the borrower. Moreover, Congress has preserved the right of borrowers to seek actual damages, in defense to any action to collect on the note, no matter when brought, if the borrower was harmed by the TILA error.

The potential cumulative effect of the interest refunds that Petitioners seek to permit could be staggering. Further, the ability of lenders to collect the remaining principal would be jeopardized because rescission renders the loan unsecured. In the end, those losses to the lending community from rescissions in equitable recoupment would be passed on to future borrowers by way of higher interest costs on loans. Certain individuals may save their property from foreclosure, but millions of others would pay more—or even be unable to buy their own home as mortgage costs are driven higher.

If *Beach* is reversed and Petitioners' arguments become settled law, these effects would aslo be felt in the secondary mortgage market. *Amici* highlight these effects here. Many mortgage loans have been sold to other financial institutions or secondary market participants—about half of all originations since at least 1989. Many such loans support mortgage-backed securities. The efficient functioning of the secondary mortgage market, a goal furthered by specific Congressional enactments, is likely to

be disrupted if many older loans might become newly subject to rescission.

ARGUMENT

I. THE RIGHT OF RESCISSION UNDER TILA IS HIGHLY TECHNICAL, AND ITS EXERCISE CAN YIELD A WINDFALL TO BORROWERS.

TILA and its right of rescission are powerful tools which use highly technical disclosure rules to police the lending process. Like many other consumer protection acts, TILA is intended to create a balance between consumer borrowers and lenders. *See, e.g., N.C. Freed Co. v. Board of Governors*, 473 F.2d 1210, 1214 (2d Cir.), *cert. denied*, 414 U.S. 827 (1973). However, the law is not intended to "create new inequities or plac[e] burdens on business beyond those necessary to make required disclosures and to provide a balance of equities between the parties." *Mechanics National Bank of Worcester v. Killeen*, 384 N.E.2d 1231, 1238-39 (Mass. 1979).[6]

A. TILA Disclosure

TILA is generally a disclosure statute. So far as is pertinent here, TILA requires that at the closing of a home mortgage loan the lender must provide to the borrower certain numerical information about the cost of the credit being extended and must disclose that the borrower has the right, in certain instances, to rescind the transaction. 15 U.S.C. § 1631(a). The required numerical disclosures are highly complex, and it is not difficult to commit error. Determination of two of the figures, the

[6] The *Killeen* Court was construing the then-current Massachusetts version of the Truth in Lending Act, a statute virtually identical to TILA. *Compare* Mass. Gen. L. c. 140C, § 10 (1969 ed.) *with* 15 U.S.C. § 1635 (1974 ed.). *See* Regulation Z, *Federal Reserve Board Official Staff Commentary*, 12 C.F.R. Part 226, Supp. I § 226-.29(a)(4) (Federal Reserve Board determined Massachusetts statute supplants TILA with respect to rescission because it provides greater consumer protection).

amounts of the "finance charge" and "amount financed," requires the lender to characterize accurately each closing cost and post-closing payment, often in the face of conflicting case law and in the absence of clear regulatory guidance. The calculation of the "annual percentage rate" takes those figures and applies a difficult economic model which itself consumes thirteen pages in the Code of Federal Regulations. 12 C.F.R. Part 226, App. J. Despite the complexity of the law and regulations, TILA requires absolute compliance, within limited error tolerances, and does not require any showing that the lender knowingly violated the law. 15 U.S.C. § 1640(a).

B. Availability of Rescission Under TILA

TILA also provides that the borrower in the case of certain types of loans has an absolute right to change his or her mind about the loan during a three-day "cooling off" period after the loan closes, and to rescind the entire transaction with no penalty. 15 U.S.C. § 1635(a). The three-day right of rescission is absolutely at the borrower's option; there does not need to be any error in the TILA disclosures in order for the borrower to rescind. The statute generally limits the availability of rescission rights to most refinance loans, such that the right applies to about 40% of all home mortgage loans made in America today. 15 U.S.C. § 1635(e)(1) (purchase-money and certain other loans exempt from rescission). *See* Mortgage Bankers Association of America, *Weekly Mortgage Survey: Nov. 28, 1997* (41% of home loans are refinance transactions).

Where there are "material" disclosure errors at the loan closing,[7] the rescission period remains open until proper

[7] The rescission period is extended until the rescission forms and related disclosures are given "together with a statement containing the material disclosures" under TILA. 15 U.S.C. § 1635(a). Those material disclosures include numerical disclosures, within specified error tolerances, of the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule. 12 C.F.R. § 226.23(a)(3) & n.48.

disclosures are made, but in no event for a period longer than three years. 15 U.S.C. § 1635(f). It often does not take much of a TILA error to keep the period open for up to three years. Only a small tolerance is permitted for certain errors in the numerical aspects of the disclosure. *See, e.g.*, 15 U.S.C. § 1635(i)(2) (error of $35.00 in "finance charge" disclosure renders loan subject to rescission in foreclosure); *Mayo v. Key Financial Services, Inc.*, 678 N.E.2d 1311, 1312-13 (Mass. 1997) ($28 in closing costs misclassified); *Cheshire Mortgage Service, Inc. v. Montes*, 612 A.2d 1130, 1141 (Conn. 1992) ($55 error). Compliance with the other disclosure rules, such as the requirement to give a written statement disclosing the right of rescission, is tricky and has spawned its own body of case law and regulatory rules. *See, e.g.*, 15 U.S.C. § 1635(i)(1)(B) (use of wrong form renders loan subject to rescission); *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 704 (9th Cir. 1986) (failure to disclose expiration date of right, although form did disclose that right expired after three days); *Simmons v. American Budget Plan, Inc.*, 386 F. Supp. 194, 200 (E.D. La. 1974) (failure to give rescission notices to each co-borrower).

C. Mechanics of the Rescission Remedy

If a borrower rescinds a loan, TILA voids the security interest on the property immediately. 15 U.S.C. § 1635(b). Within twenty days, the holder of the loan (whether or not the original creditor) must repay to the borrower all sums previously paid by the borrower on account of the loan, whether or not those amounts had been paid to that holder or to the original lender. 15 U.S.C. §§ 1635(b); 1641(c) (loan may be rescinded against "any assignee"). Among the sums that clearly must be returned to the borrower upon rescission are all interest paid and most closing costs, including loan "points." *See* Regulation Z, *Federal Reserve Board Official Staff Commentary*, 12 C.F.R. Part 226, Supp. I

§ 226.23(d)(2). After all of these sums have been returned by the creditor to the borrower, the borrower must return to the creditor the principal balance on the loan. 15 U.S.C. § 1635(b).[8]

Since a successful rescission results in a refund to the borrower of all of the interest he or she has paid, the retroactive effect is to grant the borrower an interest-free and unsecured loan with little or nothing in closing costs. *Truth in Lending: The Right to Rescind and the Statute of Limitations*, 14 Pace L. Rev. 633, 657-58 (Summer 1994). The extended rescission remedy is plainly a drastic one for lenders who do not give the proper disclosures. While Congress and the Federal Reserve Board have concluded that some errors justify keeping the cooling off period for rescission open for a time, those bodies have done so in the context of a clear three-year deadline on the face of the law. Any extension of an unlimited right to rescind beyond the outside boundary set by Congress would amount to a windfall for borrowers and a penalty upon lenders. Indeed, since a lender's exposure increases as time goes by, because the borrower keeps paying potentially-refundable interest, it is particularly important for the right of rescission to come to an end. This Court should not upset the balance struck by Congress by overriding the three-year statute as a matter of "equitable" recoupment.

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[8] As recognized by *amici* supporting Petitioners, a court has the power to refuse to permit rescission in appropriate circumstances. *E.g. In re Cox*, 162 B.R. 191 (Bankr. C.D. Ill. 1993). *See* Brief of Dorothy Botelho, James and Lillian Burnett, the National Association of Consumer Advocates, and the National Association of Consumer Bankruptcy Attorneys as *Amici Curiae* In Support of Petitioners, at 24-25 ("Botelho's Br."). TILA also rests broad discretion in trial courts to alter the procedures for the exercise of rescission, such as by crediting sums to be paid by the borrower against sums owed by the lender. *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137, 1142 (11th Cir. 1992); 15 U.S.C. § 1635(b).

II. THE FLORIDA SUPREME COURT'S REFUSAL TO ALLOW RESCISSION AFTER FIVE YEARS ENFORCES THE PLAIN LANGUAGE OF THE STATUTE, WHICH PLACES A THREE-YEAR LIMIT ON THE EXERCISE OF THE RIGHT OF RESCISSION.

The Florida Supreme Court acted correctly because it applied and enforced the language of the statute. Significantly for *amici*, it is this plain language that has guided market participants to understand that no loan is subject to rescission for TILA violations beyond the three-year deadline contained in 15 U.S.C. § 1635(f).

TILA explicitly establishes a time bar on the right of rescission:

> An obligor's right of rescission *shall expire* three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, *notwithstanding the fact that the information and forms required* under this section or any other disclosures required under this part *have not been delivered to the obligor*. . . .

15 U.S.C. § 1635(f) (emphasis added).[9]

The words chosen by Congress express an unmistakable intention that the three-year deadline was not meant to be subject to exceptions. The language is directive and definitive. The legislative choice to characterize the rescission right as one which "shall expire" is telling. *Webster's Third New International Dictionary* 801 (1986) ("expire" means "to become void through the passage of time"); *Black's Law Dictionary* 579 (6th ed. 1990) ("expiration" means "termination from mere lapse of time");

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[9] The only instance where the right does not expire at the end of three years is where there is an administrative proceeding to review TILA compliance concerning that loan, in which instance the rescission right may be extended to one year following the end of the administrative process (or a judicial review thereof). 15 U.S.C. § 1635(f).

Barron's Dictionary of Business Terms 211 (2d ed. 1994) ("expiration" means to "ceas[e] to be effective"); *Kaplysh v. Takieddine*, 519 N.E.2d 382, 385 (Ohio 1988) (collecting definitions); *Crease v. Babcock*, 40 Mass. (23 Pick.) 334, 346 (1839) ("expired" means "ceased to have force"). *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (action to be brought "in no event" more than three years after offering or sale of the security; deadline "can have no significance in this context other than to impose an outside limit"); *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 (10th Cir. 1980) (Interstate Land Sales Full Disclosure Act; similar deadline is "absolute bar").[10]

Other elements of the structure of the statute support affirmance of the decision below. Congress has expressly permitted TILA violations to be raised "as a matter of defense by recoupment or set-off," but only with respect to claims for damages. 15 U.S.C. § 1640(e). In contrast, TILA amendments in 1995, adding 15 U.S.C. § 1635(i), confirmed that the three-year repose period applies equally to defenses and affirmative claims of rescission. Truth in Lending Act Amendments of 1995, Pub. L. 104-29, § 8, 109 Stat. 271, 275 ("1995 TILA Amendments"), *codified as* 15 U.S.C. § 1635(i). Those amendments specifically provided for certain new rights to exercise rescission as a defense to a foreclosure, but made those rights "subject to the time period provided in subsection (f)." 15 U.S.C. §§ 1635(i)(1), (2). Congress further limited the use of the right to rescind to the express parameters it established in 15 U.S.C. § 1635, by providing that "[e]xcept as specified" therein the right of rescission shall not affect the "validity or enforceability of any contract." 15 U.S.C. § 1610(d).

[10] In common usage, the word "expire" often is used to connote the ending of a period with no hope for revival, as in the use of the word to describe a person's death or the ending of an insurance policy.

Although the 1995 TILA Amendments added 15 U.S.C. § 1635(i)(3), which states that "nothing in this subsection affects a consumer's right of rescission in recoupment under State law," this language does not create a broad exception to the three-year deadline. The subsection is far from an express grant of federal rights to rescind loans where the right to rescind has expired, despite what Petitioners and their *amici* contend. Brief for Petitioners, at 20-22 ("Pet. Br."); Brief *Amicus Curiae* of the American Association of Retired Persons in Support of Petitioners, at 10-11 ("AARP's Br."); Botello's Br., at 12-14. By its terms, the subsection is nothing but a clause saving rights that arise "under State law," whereas TILA rescission arises under federal law.

It should not be interpreted otherwise, because such an interpretation renders as a nullity the express reference contained in subsections (i)(1) and (i)(2), governing rescissions in defense to foreclosure, to the general three-year time bar. If 15 U.S.C. § 1635(i)(3) were a grant of affirmative federal rights to rescind, unlimited in time, then the statute inconsistently would dictate that persons like the Beaches could *never* raise rescission in defense to foreclosure beyond the statutory time limit (15 U.S.C. §§ 1635(i)(1), (2)), except that they *always* could do so (15 U.S.C. § 1635(i)(3)). This construction is absurd, and must be rejected for that reason. *Pritzker v. Yari*, 42 F.3d 53, 67-68 (1st Cir. 1994) (statutes are to be interpreted to avoid absurd results), *cert. denied*, 514 U.S. 1108 (1995).[11]

[11] Nor should the language of subsection (i)(3) be stretched to benefit the Beaches on the theory that TILA must be liberally construed to protect consumers. Petitioner's Br., at 33; Botelho's Br., at 5-6. The proper rule of construction is that rescission rights under TILA should be construed liberally when necessary to effectuate the purpose behind the statutory remedy. *See, e.g., N.C. Freed Co. Inc. v. Board of Governors*, 473 F.2d at 1215; *Shepard v. Financial Associates of Auburn, Inc.*, 316 N.E.2d 597, 603 (Mass. 1974). Giving consumers the right to rescind forever, rather than

In enacting the 1995 TILA Amendments, Congress did not amend or qualify its earlier plain directive that all rescission rights under TILA "shall expire . . . notwithstanding the fact that . . . disclosures . . . have not been delivered to the obligor." 15 U.S.C. § 1635(f). Reading 15 U.S.C. § 1635(i)(3) to amend this deadline *sub silentio*, and to create endless federal rescission rights, is not a fair interpretation of Congressional intent as expressed in the law.

To the extent there is any uncertainty in the plain words of the statute, indicia in the legislative history support the interpretation that Congress did not intend to allow time-barred rescissions based on TILA to be raised as a defense to foreclosures. In 1972, both the Board of Governors of the Federal Reserve System and the National Commission on Consumer Finance recognized in separate reports to Congress that the possibility of an endless rescission right is a cloud on the enforceability of liens, and so recommended that the three-year time deadline on rescission be added to TILA. Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1971*, at 19 (Jan. 3, 1972); National Commission on Consumer Finance, *Consumer Credit in the United States*, at 190 (Dec. 1972). Congress subsequently amended the original law to so provide. *See* Pub. L. 93-495, § 405, 88 Stat. 1517, *codified at* 15 U.S.C. § 1635(f). Adding a "recoupment" exception for damages claims in 1980, Congress chose not to include any similar exception for rescission claims. Truth in Lending Simplification and Reform Act, Pub. L. 96-221, §§ 612(a), 615(a)(4), 94 Stat. 175, 180, *codified at* 15 U.S.C. §§ 1635, 1640. When the three-year

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just for three years, will not further the compliance goals of TILA to any meaningful degree. The existing right of rescission already is a powerful tool. It should not be a limitless penalty. *See James v. Home Construction Co. of Mobile, Inc.*, 621 F.2d 727, 730 (5th Cir. 1980) (rescission right not intended to be a penalty).

deadline was again left undisturbed in 1995, the Congressional floor leaders emphatically stated that rights of rescission in response to a foreclosure must be exercised within three years of the loan closing, or be lost forever. 141 Cong. Rec. S14568 (Sept. 28, 1995) (Statement of Sen. Mack); 141 Cong. Rec. H9515-9516 (Sept. 27, 1995) (Statement of Rep. McCollum). *See N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt"); 2A *Sutherland Statutory Construction*, § 48.12 (5th ed. 1992) (significant weight given to those "intimately involved with drafting of legislation"). In contrast, there is not a shred of legislative commentary, in committee reports or floor statements, that directly suggests Congress ever intended to either create or approve of a recoupment exception to the statutory expiration of the right of rescission.[12]

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[12] Even if TILA's statutory scheme were not antithetical to the recognition of a right of rescission in recoupment, such a right should not be allowed because the Beaches also cannot meet the fundamental predicate to recoupment that the foreclosure claim and the TILA claim arise from the same transaction or occurrence. *See Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 299-300 (1946). Most of those courts that have faced the issue have found that claims seeking a remedy for TILA violations and actions for foreclosure do not arise out of the same transaction or occurrence. *Eubanks v. Liberty Mortgage Banking Ltd.*, 976 F. Supp. 171 (E.D.N.Y. 1997) (collecting cases in federal circuit courts); *Bank of Oklahoma, N.A. v. Briscoe*, 911 P.2d 311, 318-319 (Okla. Ct. App. 1995). *Accord* Kathleen E. Keest and Gary Klein, *Truth in Lending* §§ 7.5.3.2, 7.5.5 at 393, 395 (3d ed. 1995 & Supp. 1996) ("Majority rule in the federal courts is that [foreclosure actions] are permissive" counterclaims to TILA claims). Generally speaking, claims concerning contract formation do not arise out of the same transaction as claims concerning contract breach, for purposes of the recoupment exception to a time bar. *See, e.g., SCM Corp. v. Fisher Park Lane Co.*, 358 N.E.2d 1024, 1027 (N.Y. 1976); *Union Electric Co. v. Mansion House Center North Redevelopment Co.*, 494 S.W.2d 309 (Mo. 1973).

III. A COMMON LAW EQUITABLE EXCEPTION TO RESCISSION DEADLINES WOULD BE HIGHLY INEQUITABLE.

Petitioners and their *amici* urge this Court to create an equitable recoupment exception to the statutory rule that no loan older than three years can ever be rescinded for TILA violations. This proposed exception is ill-advised, because it is entirely inconsistent with the equitable underpinnings of the recoupment doctrine. *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946). Recognizing a right of late rescission would be highly inequitable. Such a judge-made exception, if generally applied, would adversely affect the home mortgage market, involve the courts in litigation that Congress believed should be time barred, and yield windfalls for some borrowers.

A. Permitting Time-Barred Rescission Would Likely Lead To Significant Losses In The Home Mortgage Finance Market.

The issues in this case have the potential for calling newly into question the enforceability of many mortgage

with an enormous, unexpected and disproportionate loss. An example is helpful. Assume a $100,000 30-year mortgage loan was refinanced on January 1, 1990, at 9% interest with no origination charges. Assume further that the lender understated the finance charge by $36.00, an error that, for three years after closing, gives the borrower a right to rescind if the loan were to go into foreclosure. 15 U.S.C. § 1635(i)(2). By February 1, 1998, the hypothetical borrower in this example, would have made $70,297.17 in interest payments and $7,751.23 in principal repayment. The outstanding principal balance on the loan then would be $92,248.77. If the loan went into default at that point, the lender could expect to recover the principal balance through the foreclosure process. However, if the borrower was permitted to rescind the loan using equitable recoupment—even though he had enjoyed the use of the money for more than eight years—the lender would be required to return, or credit to the borrower's account, the entire $70,297.17 sum which the borrower had paid in interest over the years. The net amount of the remaining principal recovered by

has made it quite common that rescission is asserted against innocent assignees.[14]

Second, many, if not most, untimely rescissions are attempted on the eve of or during a bankruptcy case filed by the borrower. Upon rescission, the lender will have a mere unsecured claim for the principal balance in the borrower's bankruptcy. Even in a Chapter 13 case, a reorganization in which the debtor agrees to a plan for repayment of creditors, the creditor usually receives only pennies on the dollar of that unsecured claim, often over a long period of time.[15] One Bankruptcy Court has found

[14] It often is impossible for secondary market purchasers of mortgage loans to determine whether a loan is potentially rescindable. Eligibility for extended rescission is first a fact question about the nature of the transaction that gave rise to the loan, namely, whether it is the type of loan for which rescission is available. 15 U.S.C. § 1635(e) (listing exemptions). Second, the secondary market purchaser would need to determine whether any "material" disclosure errors occurred at the closing. 12 C.F.R. § 226.23(a)(3) & n.48. This often requires a decision on whether something was a "finance charge," a fact-intensive inquiry that depends, in part, on whether the charge was "imposed" by the creditor. 15 U.S.C. § 1605(a); 12 C.F.R. § 226.4(a). These facts are usually not noted in the loan file, and thus are beyond the knowledge of the investor that purchases the loan. Further, because of the large volume involved, the smooth functioning of the secondary mortgage market requires that most home mortgage loans are bought and sold without examination of individual loan files, with reliance instead upon representations and warranties by the seller that the loans are enforceable.

[15] For example, in the *Botelho* case, which involves *amicus* Dorothy Botelho, the Massachusetts Bankruptcy Court permitted rescission to be exercised in recoupment 5½ years after a TILA error was committed at the loan closing. *In re Botelho*, 195 B.R. 558 (Bankr. D. Mass. 1996). The lender found its mortgage voided, and the Court reduced the $64,108.27 owing by subtracting from the debt the amount of interest the borrower had paid and TILA statutory damages of $1,000. The resulting unsecured claim was only $22,729.17. The Court then approved Botelho's proposed Chapter 13 plan, which provides for the lender to be paid only $6,750 in total, and allows Botelho to do so in installments over five (5) years.

this lack of mutuality of remedy to be so egregious that rescission in recoupment could not be allowed. *In re Cox*, 162 B.R. 191, 197 (Bankr. C.D. Ill. 1993). While this problem arises whether or not rescissions occur during the three-year period, the unfairness is more pronounced the longer the loan is in effect.

By any market-wide measure, the potential for losses is great. Estimates suggest that some $5 billion in older mortgage loans to which the right of rescission ever attached are in foreclosure at any one time.[16] *Amici* know of no reliable estimate of how many of these loans have TILA errors that would allow rescission, but the danger is real. Technical violations of TILA are not unusual.[17] Lenders strive for one hundred per cent accuracy in compliance, but in such a large industry and with such a difficult statute to work with, errors do occur. One group of consumer lawyers believes such violations to be common enough that "[a]dvocates representing clients in [con-

[16] In order to be at risk for rescission beyond the three-year expiration of the right, the loan would have to be (i) more than three years old, (ii) in foreclosure and (iii) a qualifying loan, such as a refinancing. According to recent figures, total single family mortgage debt currently is in excess of $4.0 trillion. *Inside Mortgage Finance*, at 4 (Oct. 31, 1997). Of that, about $1.8 trillion in loans was more than three years old. *Inside Mortgage Finance*, at 12 (Nov. 14, 1997) ($2.2 trillion in loans originated during period 1994-1996). Applying current data that 40% of all home loans are refinancings, about $0.72 trillion in outstanding mortgage debt was a result of a refinance. One industry estimate puts at least 0.70% of all loans in foreclosure at any one time. *Inside Mortgage Finance*, at 6 (Dec. 5, 1997). That yields an estimated total of refinanced loans in foreclosure of about $5.04 billion.

[17] In Congressional testimony, the Chairman of the Federal Deposit Insurance Corporation has stated that "the complexity of Regulation Z [that implements TILA] is such that the FDIC cited more than 2,700 of the 3,500 institutions we examined in 1994 for at least one violation." *Hearing on Senate Bill 650 before Subcommittee on Financial Institutions and Regulatory Relief of the Senate Committee on Banking, Housing and Urban Affairs*, 104th Cong., 1st Sess., at 9 (May 2, 1995).

nection with foreclosures] who do not evaluate the case for the possibility of Truth in Lending rescission are flirting with malpractice." Kathleen E. Keest and Gary Klein, *Truth in Lending* § 1.1.2 at 33 (3d ed. 1995 & Supp. 1996). Even if only a small percentage of borrowers attempted to rescind in foreclosure after the expiration of the three-year period, the industry impact could run into the hundreds of millions of dollars each year.

Court decisions that pose a significant nationwide threat to the value of mortgages in turn threaten the availability of low interest loans that allow millions of Americans to acquire, borrow against or refinance their homes. Reversal of *Beach* could result in a wave of unexpected rescission claims that would increase unrecoverable losses borne by the very banks and savings associations to which consumers turn for additional loans, or, in some instances, borne by the participants in the secondary mortgage market. To offset these losses, mortgage originators might have to collect higher yields from borrowers, thus effectively raising mortgage interest rates and/or closing costs.

Higher mortgage costs are inflationary and ultimately are borne by everyone in the borrowing public. Among those hardest hit, if Petitioners prevail here, would be consumers who would like to become homeowners, or are struggling to hold onto their homes; in either case, higher costs will make it more difficult for these consumers to achieve or maintain home ownership. While Petitioners' *amici* attempt to champion the rights of consumers, the benefits those *amici* seek to create may well harm borrowers as a group.

In contrast to these tremendous potential losses and harms, borrowers asserting stale rescission rights usually present little reason why any court should use its equitable powers to aid them. Most often, such borrowers have suffered no harm from the TILA violation and never would have rescinded within the three-day cooling off period if the disclosures had been precisely correct. The case at bar

is a classic example of how unfair it would be to use the equitable doctrine of recoupment to permit the exercise of expired rescission rights. As noted, the TILA errors at the Beaches' closing were committed when the Bank *overstated* the cost of credit. The Beaches did not claim (nor could they credibly claim) that had the disclosure been correct they would have changed their minds about the loan, and rescinded. Instead, the violation was a technicality they seized upon years later when they defaulted for reasons unrelated to the TILA violation. This is consistent with the experience of *amici* that where borrowers attempt to rescind in recoupment, the TILA violations are typically minor and technical ones that the borrower does not even allege affected the decision to rescind.

It is important to observe that while preventing rescission after three years, Congress did not leave borrowers without a remedy in those instances where the borrower had been harmed by the TILA error. Under 15 U.S.C. § 1640(e), actual and statutory damages, plus attorney's fees, can be awarded in any action to collect on the loan, regardless of the one-year limitations deadline ordinarily applied to TILA damage actions. That is, borrowers who relied upon an erroneous TILA disclosure to their detriment always retain the right to be made whole through the remedy of an award of actual damages, if proven. 15 U.S.C. § 1640(a)(1); *Adiel v. Chase Federal Savings and Loan Association*, 630 F. Supp. 131, 133 (S.D. Fla. 1986) (actual damages awarded upon showing reliance and monetary loss). Enforcing Congress' decision to cut off the additional right of rescission simply prevents the borrower from being made more than whole.

Thus, the overall effect of a reversal of *Beach* will be negative, with no corresponding or off-setting equitable considerations. This is hardly a situation where the courts should use their equitable powers and invoke the equitable doctrine of recoupment to permit the exercise of expired rescission rights. Congress already has chosen to limit

extended rescission rights by the three-year deadline, and thus to prevent the significant losses that occur as a result of rescissions five, ten or fifteen years after loan closing. That judgment should not be upset.

B. The Ability To Rescind Loans Many Years After The Closing Is Likely To Encourage Litigation And Even Cause Abuse By Borrowers.

If *Beach* is reversed, and consumers obtain a right in equitable recoupment to exercise an untimely TILA rescission, there is a substantial risk that large numbers of consumers and their advocates will use that power to challenge foreclosures. There already is a substantial body of anecdotal evidence, from certain states where untimely rescissions have been attempted, of how serious this risk really is. The example of Florida is instructive. The Florida Supreme Court's *Beach* decision disposed of not only the dispute between the Bank and the Beaches, but also similar claims made in five other lawsuits in the appellate courts of Florida.[18] *Amici* are aware of some two dozen cases in the trial courts of Florida in the last several years in which late rescissions were attempted. In at least two instances, the loans were outstanding for about seventeen years before the borrower stopped paying and attempted to rescind defensively. *Fidelity Federal Savings Bank of Florida v. Fuchs*, Case No. CL 94-2478-AD (Fla. 15th Jud. Cir. Ct.); *Fidelity Federal Savings Bank of Florida v. Leibovit*, Case No. 96-6549-AI (Fla. 15th Jud. Cir. Ct.). In another case, the loan was so large and the attempted rescission was so late that the claimed refund of finance charges paid prior to the late rescission exceeded $500,000. *PNC Mortgage Corp. of*

[18] *BankAmerica National Trust Co. v. Zayas-Bazan*, 698 So. 2d 1261 (Fla. Dist. Ct. App. 1997); *Dove v. McCormick*, 698 So. 2d 585 (Fla. Dist. Ct. App. 1997); *Great Western Bank v. Shoemaker*, 695 So. 2d 805 (Fla. Dist. Ct. App.), *review denied*, 699 So. 2d 1375 (Fla. 1997); *Key Savings Bank, F.S.B. v. Dean*, 695 So. 2d 808 (Fla. Dist. Ct. App. 1997); *Kasket v. Chase Manhattan Mortgage Corp.*, 695 So. 2d 431 (Fla. Dist. Ct. App. 1997).

America v. Diaz, Case No. CL 95-8530-AD (Fla. 15th Jud. Cir. Ct.). *See also Transamerica Financial Services, Inc. v. Abendroth*, No. C8-96-4307 (Minn. 10th Jud. Dist. Ct. April 17, 1997) (borrower received rebate of $16,890.00 on $18,800 loan).

Florida is not an aberration. The issue before this Court is also before the First Circuit Court of Appeals. *Citicorp Mortgage, Inc. v. Botelho*, No. 97-1535 (1st Cir.), *stay issued* Oct. 29, 1997. A rapidly growing body of reported case law in only the last four years reflects what appears to be an exponential growth in the number of instances where untimely rescissions are being attempted, particularly in the Bankruptcy Courts.[19]

Abuse by the consumer may well be a feature of many of such suits. *Beach v. Great Western*, 670 So. 2d at 991, and 692 So. 2d at 151-52 (recognizing danger that borrowers unrestricted by the repose deadline can default in order to trigger their right to defensive use of rescission); *In re Audino*, 10 B.R. 135 (Bankr. R.I. 1981) (same). The case of *Signet Mortgage Corp. v. Tucker*, C.A. No. 96-10932-REK (D. Mass.), recently before District Judge Robert E. Keeton of the District of Massachusetts, provides a chilling example of how permitting late rescissions

[19] *E.g., Jones v. Saxon Mortgage, Inc.*, No. 3:96CV918, 1997 U.S. Dist. LEXIS 15113 (E.D. Vir. Aug. 5, 1997) (late rescission refused); *Nembhard v. Citibank, N.A.*, No. CV-96-3330, 1996 U.S. Dist. LEXIS 20062 (E.D.N.Y. Oct. 25, 1996) (late rescission refused); *Arnold v. Waterfield Mortgage Co.*, 966 F. Supp. 387 (D. Md. 1996) (late rescission refused), *aff'd*, 116 F.3d 472 (4th Cir. 1997); *In re Fidler*, 210 B.R. 411 (Bankr. D. Mass. 1997) (late rescission permitted); *In re Botelho*, 195 B.R. 558 (1996; late rescission permitted); *In re Hall*, 188 B.R. 476 (Bankr. D. Mass. 1995) (late rescission refused); *In re Shaw*, 178 B.R. 380 (Bankr. D.N.J. 1994) (late rescission permitted); *In re Cox*, 162 B.R. 191 (1993; late rescission refused); *First Trust National Association v. Chiang*, 662 N.Y.S.2d 136 (App. Div. 1997) (mem.) (late rescission permitted); *Citizens Federal Bank, F.S.B. v. Brickler*, 683 N.E.2d 358 (Ohio App. 1996) (late rescission refused); *Westbank v. Maurer*, 658 N.E.2d 1381 (Ill. App. Ct. 1995) (late rescission permitted), *appeal denied*, 664 N.E.2d 648 (Ill. 1996).

grants a right likely to be misused. In the *Tucker* case, the borrower obtained a loan in early 1988 in the amount of $105,000, but subsequently was chronically late on payments, missed many months, and was in and out of bankruptcy three times.[20] In 1995, he approached a "mortgage counselor" for assistance. Upon review of the loan documents, the counselor opined that TILA "had been broken" in his case, told him that he had a right to rescind the loan under certain circumstances, and advised him to stop paying on the loan, which he did. She referred him to a Boston attorney who, after the lender initiated foreclosure, purported to rescind the loan on the borrower's behalf. Rather than being able to foreclose on a defaulted borrower, the lender ended up in the federal courthouse.

While a number of suits and counterclaims attempting late rescissions have been filed, *amici* are fearful of many more to come. The acceleration of case authority and attention apparently reflects the reality that this issue has just recently moved to the forefront. It is the nature of our adversary system that decisions favoring untimely rescissions are already being used to defeat or hold up legitimate foreclosures on mortgages that were presumed enforceable for many years. Indeed, *amici* who appear here in support of Petitioners are some of the consumer advocates who have used, or supported the use of, this strategy for their clients. *See* AARP's Br., at 14, n.32; Botelho's Brief, at 2; Keest and Klein, *Truth in Lending* § 1.1.2 at 33.[21]

[20] The deposition of plaintiff Donald Keith Tucker, from which these facts are drawn, is on file at the United States District Court for the District of Massachusetts. Deposition of Donald Keith Tucker (Feb. 21, 1997), filed in *Signet v. Tucker*, March 5, 1997.

[21] For example, a Massachusetts legal education seminar recently invited attorneys to learn "How to require a lender to credit all payments made on a mortgage to reduction of principal, effectively turning a traditional interest-bearing promissory note into an interest-free loan," and "How to raise federal Truth-in-Lending Act violations as defenses to a foreclosure action, even though the statute of limitations for bringing such actions has expired." *Consumer Finance Regulation*, advertising Jan. 28, 1997 Massachusetts Continuing Legal Education Seminar.

Moreover, these cases can be difficult to defend; not only can documents occasionally get lost in the blizzard of paperwork created by the millions of mortgage loans extended every year, but the underlying facts essential to determining the existence of a TILA violation become difficult to uncover over time. *See* n.14, *supra*. The consequence of numerous individual cases, each prosecuted separately, would have a significant impact on the lending industry as a whole.

Petitioners' *amici* try to divert attention from the inequity of permitting rescission in recoupment by asserting that rescission rights ought to be eternally available in order to protect borrowers from those in the lending industry whom *amici* believe to be unethical. AARP's Br., at 27-29.[22] This argument is based on the faulty assump-

[22] There is no merit in the speculation of Petitioners' *amici*, and of some courts, that lenders act in bad faith and abuse the right to foreclose, waiting until after the three-year deadline so as to avoid a rescission. AARP's Br., at 13; *Botelho*, 195 B.R. at 566; *Dawe v. Merchants & Trust Corp.*, 683 P.2d 796, 801 (Colo. 1984). The realities of modern mortgage banking make such abuse highly unlikely. Many mortgages are now "serviced" (*i.e.*, payments collected, records kept, escrow accounts managed) under contracts or federal guidelines that, within a range of some discretion, generally provide that foreclosure proceedings must be started within 3-9 months of default. *See Freddie Mac Single Family Seller/Servicer Guide*, Ch. 66.9; *Fannie Mae Servicing Guide*, Part VIII, § 102; Federal Housing Administration, *Administration of Insured Home Mortgages*, Directive No: 4330.1, ch. 7.12(D). *See also Beach v. Great Western*, 670 So.2d at 990 ("[m]odern banking regulations make [the prospect of lenders waiting out the three-year period and then foreclosing] highly unlikely.") Other significant forces at work create pressure on lenders and servicers not to sit on their rights. Loans in default adversely affect lenders' balance sheets. Regulatory agencies concerned with the safety and soundness of financial institutions monitor for such losses. Moreover, the interest lost on sums tied up in a delinquent mortgage loan is incentive enough for any lender or servicer to foreclose in a reasonable time after default.

tion that TILA rescission is a borrower's only remedy in such an instance. As noted, if the borrower has suffered actual damage from the TILA violation, the statute permits an otherwise untimely claim to recover that loss if the lender sues to collect. 15 U.S.C. § 1640(e). Borrowers have a panoply of other common law and statutory rights and remedies, too numerous to catalog, that they can and do raise in suits with those whose money they borrowed. Legal advocacy organizations, including Petitioners' *amici*, are active in the courts and in the halls of legislatures advocating for those borrowers. If Congress has not addressed those perceived problems sufficiently, it hardly is the province of the courts to upset the legislative decision contained in 15 U.S.C. § 1635(f) by creating equitable exceptions to the stated expiration date in the law.

IV. A STRONG CONGRESSIONAL POLICY OF FOSTERING A STABLE AND HEALTHY SECONDARY MORTGAGE MARKET IS FURTHERED BY AFFIRMING THE LOWER COURT'S RULING.

The decision of the Florida Supreme Court is consistent with the strong express Congressional policy in favor of encouraging the national secondary mortgage market. Permitting consumers to raise rescission claims at any time, on the other hand, would undermine the economic certainty and stability that are essential to the efficient functioning of an orderly national mortgage market.

The most important development in mortgage finance since World War II has been the creation of a national financial market where mortgage loans are sold by lenders after the loans have been made. This phenomenon is often referred to as the "secondary mortgage market." The secondary mortgage market has enabled lenders to sell mortgages almost immediately, replenishing the lenders' funds and thereby enhancing liquidity. The most prominent of the secondary mortgage market investors are two government-sponsored enterprises, *amici* Freddie Mac and Fannie Mae.

Congress, in chartering *amici* Freddie Mac and Fannie Mae and in several other enactments, has consistently pursued a strong policy of encouraging the secondary market. *See, e.g.*, 12 U.S.C. § 1716 (Fannie Mae); 12 U.S.C. § 1451, note (Freddie Mac); Secondary Mortgage Market Enhancement Act of 1984, Pub. L. 98-440, 98 Stat. 1689 (1984). Only two years ago, Congress enacted the 1995 TILA Amendments with the stated intention of increasing protections for the secondary market from substantial losses resulting from rescissions for certain technical TILA violations. 141 Cong. Rec. H9515 (Sept. 27, 1995) (Statement of Rep. Roukema); 141 Cong. Rec. S14566-14567 (Sept. 28, 1995) (Statement of Sen. D'Amato). As a result of these and other public and private initiatives, about half of all mortgage loans originated today are sold on the secondary market. *Inside Mortgage Finance*, at 9 (Apr. 19, 1996).

As purchasers of mortgage loans, these federally-chartered enterprises are a source of private capital for lenders, increasing lenders' ability to make additional loans available to other homeowners. In turn, Fannie Mae and Freddie Mac retain some loans in portfolio, and group, or pool, others in mortgage-backed securiites for sale to investors or for swaps with lenders. Many banks, mortgage companies, and other investors also buy and sell mortgages for their own portfolios and for formation of mortgage-backed securities.

These secondary market mechanisms provide the source of funds for billions of dollars of mortgage loans to consumers annually. This phenomenon has achieved a tremendous increase in the availability of mortgage capital nationwide by greatly enhancing the liquidity of lenders. The resulting increase in the flow of capital has reduced the cost of both financing home purchases and, generally, of home ownership in the United States by billions of dollars each year. Kenneth G. Lore, *Mortgage-Backed Securities* at 1-2 (1996 ed.) (secondary market saves borrowers more than $2 billion each year due to cheaper

mortgages). It also has been an integral part of achieving the oft-repeated Congressional goals of encouraging and supporting home ownership and of providing full access to home mortgage loans. *See, e.g.*, 12 U.S.C. § 1709 (FHA mortgage insurance program); 12 U.S.C. § 1464 (savings and loan charters issued "to provide . . . for the extension of credit for homes").

One of the crucial assumptions on which trillions of dollars of loans are bought and sold on the secondary market is that those loans are valid and enforceable. With respect to TILA, market participants understand that certain loans potentially are rescindable, but only for three years. Reopening these loans to rescission claims—and litigation, such as this and other cases—would be inconsistent with the decision by Congress to encourage a stable secondary mortgage market for loans.

The classic goals of finality and peace that are served by statutory deadlines are particularly important to secondary market participants. *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) (deadlines prevent suits that "upset settled expectations"). Mortgage holders and other secondary market participants that have guaranteed the performance of mortgages would bear the initial risk of loss from a new interpretation of the statute that recognizes open-ended rescission liability. That loss may be passed back to those that sold the loans, typically with representations and warranties that the mortgages are enforceable, to such participants.[23] However, wherever the loss

[23] Although loans are usually sold subject to indemnification rights for breach of representations and warranties, the secondary market's system of indemnity rights may not work smoothly many years after the loan has closed. Companies go out of business, and contract documents are inadvertently lost or destroyed. Moreover, with such large exposure from late rescissions, potential indemnitors are more likely to litigate. For example, the *Tucker* case discussed *supra* at 23-24 led to litigation between the loan servicer and a prior assignor of the loan as to which assignee would pay the

ultimately falls, Congressional encouragement of a stable and secure secondary market is frustrated, rather than fostered, by open-ended rescission.

CONCLUSION

For the reasons that *Beach* was correctly decided under 15 U.S.C. § 1635(f), and that reversal would be inequitable because of many negative effects on lenders, borrowers and secondary mortgage market participants, undersigned *amici curiae* urge affirmance of the decision below.

Respectfully submitted,

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defense costs of the *Tucker* suit and any ultimate loss. *Signet Mortgage Corp. v. Huntington Mortgage Co.*, No. 96-418 (E.D. Va.). The result of any reversal of *Beach* is likely to be financial uncertainty for each entity that now owns or has ever owned an affected loan.